Office-Supreme Court, U.S.
FILED
FEB 27 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 877

EDGAR I. SHOTT, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No.

EDGAR I. SHOTT, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

Appellant Edgar I. Shott, Jr. appeals from a final judgment of the Supreme Court of the State of Ohio. The appeal presents the question whether Shott's conviction for violating the Ohio Blue Sky Law was consistent with the principles of due process as guaranteed in the Fourteenth Amendment to the Constitution.

OPINIONS BELOW

There were no opinions written below. Appellant was convicted in the Court of Common Pleas, Hamilton County, Ohio, for two violations of the Ohio Blue Sky Law. His conviction was affirmed by the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio; the judgment stated that the court found no error apparent on the record which was prejudicial to the Appellant (Appendix A). The Supreme Court of the State of Ohio dismissed Shott's subsequent appeal because "no debatable constitutional question" was presented (Appendix B).

JURISDICTION

Appellant was indicted and convicted on two counts for violations of the Ohio Blue Sky Law and sentenced to one to five years at hard labor in the Ohio State Penitentiary. The indictment charged, without any semblance of particularity, that Shott had violated all forty-five sections of the Ohio Securities Act, Ohio Rev. Code 1707.01-1707.45 (herein referred to as the "Ohio Blue Sky Law").

On June 27, 1962, the Ohio Supreme Court dismissed Shott's appeal, denied his motion for leave to appeal from the Ohio Court of Appeals, and entered judgment to that effect. A petition for rehearing, timely filed, was denied on October 3, 1962. On December 29, 1962, a notice of appeal to the United States Supreme Court was filed in the Ohio Supreme Court.

The jurisdiction of this Court to hear this appeal rests upon 28 U.S.C. § 1257(2). Should the Court determine that certain denials of federal Constitutional rights presented here are not proper subject

matter of an appeal, they should be considered as if contained in a petition for certiorari. 28 U.S.C. § 2103.

QUESTIONS PRESENTED

I. Whether the Ohio Blue Sky Law, as applied here to Appellant, violated due process of law,

(a) because the statute was so vague and indefinite (as evidenced by its application here) that it failed to provide notice to Appellant that his conduct was proscribed by the penal provisions of the Law, and

(b) because as applied here, it improperly and unconstitutionally placed the burden of proof upon Appellant and created an invalid statutory presumption.

II. Whether the prosecutor's closing argument deprived Appellant of due process of law.

THE STATUTE INVOLVED

The statute involved is the Ohio Securities Act, Ohio Rev. Code, §§ 1707.01-1707.45, and particularly sections 1707.01(B), (C)(1), (C)(2), (E)(1) and (E)(2); 1707.02(G); 1707.14(A), and (B)(2); 1707.30; 1707.44(A) and (C)(1); and 1707.45. The text of these sections is set forth in Appendix C.

STATEMENT OF THE CASE

The Appellant, Edgar I. Shott, Jr., is an attorney and a member of the bar of the State of Ohio. He has been charged with and convicted of a violation of the Ohio Blue Sky Law. Shott's "criminal" conduct which was found sufficient to violate the State securities law consisted of making one promissory note in a

single loan transaction with an old friend. He has been sentenced to serve one to five years at hard labor in the Ohio State Penitentiary.

1. The Indictment

The indictment, charging Appellant with violating the entire Ohio Blue Sky Law, related to a single transaction—Shott's delivery of a cognovit note to one Sestito as evidence of a personal loan which Sestito made to Shott. (See Indictment, Appendix D, *infra.*)[1] On the basis of that one transaction, Shott was charged (i) with *selling* securities without being licensed as a securities dealer[2] and (ii) with knowingly *selling* an unlicensed security.[3]

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[1] Since the record as filed in this Court is not paginated, references relate to the particular documents contained in the three bound volumes filed as the record herein: (i) "Common Pleas Court, Hamilton County, Bill of Exceptions," containing the trial transcript (referred to as "Tr. Trans."); (ii) "Appeal on Questions of Law," which contains, *inter alia*, briefs before the Ohio Court of Appeals (Appellant's brief: "Shott Br. Ct. App."), the Indictment, and Motion for New Trial; (iii) "Certified Transcript of Record," containing Notice of Appeal and briefs before the Supreme Court of Ohio (Appellant's briefs: "Shott Br. Ohio Sup. Ct." and "Shott Reply Br. Ohio Sup. Ct."; Appellee's brief: "State Br. Ohio Sup. Ct.").

[2] The first count of the Indictment (App. D) alleged that Appellant,

> ". . . did unlawfully sell . . . to Patrick Sestito, a security, to wit, a written instrument evidencing a promise to pay money, which the said Edgar I. Shott, Jr. . . . was not then and there licensed to sell securities in accordance with the provisions of the Ohio Revised Code 1707.01 to 1707.45. . . ."

[3] The second count (App. D) charged that Appellant,

> ". . . did knowingly, unlawfully and intentionally sell . . . to Patrick Sestito, a security, to wit: A written instrument evidencing a promise to pay money which security was not then

At the outset of the trial, Appellant, by demurrer, challenged the validity of the indictment (Tr. Trans. 2). He charged that the Ohio Blue Sky Law was so vague and indefinite as to be void under the due process clause of the Fourteenth Amendment.[4] The trial court, without benefit of oral argument, overruled the demurrer (Tr. Trans. 2).

2. The Evidence

The State's entire evidentiary case, consisting of the testimony of only two witnesses, is so brief that we have printed the complete transcript in Appendix E. The State's first witness was an Attorney Examiner for the Ohio Division of Securities who testified to the conceded facts that Shott was not a registered securities dealer and that the single promissory note which was the basis of the entire action was not registered with the Ohio Division of Securities[5] (Tr. Trans. 11-16; App. E 8a-11a).

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and there registered by description nor then and there registered by qualification in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45, inclusive, and which security and transaction was not then and there registered or exempted by Ohio Law. . . ."

[4] See certified copy of Demurrer and Memorandum in Support lodged with this Court.

[5] The note itself was introduced as State's Exhibit No. 1:

"$2250.00 Cincinnati, Ohio, September 28, 1960

Sixty (62) [*sic*] days after date for value received I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 dollars with Interest at the rate of ..... per centum per annum at ..... and I hereby authorize any Attorney at Law to appear in any Court of Record in the State of Ohio, or any other State in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me in favor of

The other witness, creditor Patrick Sestito, described the loan transaction. Sestito was a long-time friend of Shott's, and Shott had at least twice been his counsel (Tr. Trans. 26; App. E 19a). On September 28, 1960, as he often did, Sestito paid a casual social call on Shott (Tr. Trans. 7, 18, 22; App. E 12a, 15a). There were no advance arrangements made for Sestito's visit (Tr. Trans. 18; App. E 13a).

Sestito testified that when he went into attorney Shott's office, Shott said that he would like to borrow some money from him and would give Sestito 12½ per cent interest for the use of his money for 60 or 62 days' time (Tr. Trans. 17, 20, 29; App. E 12a, 14a, 19a); Sestito agreed to loan Shott $2,000, and the two parties decided to lump the principal and interest on the face of the note (Tr. Trans. 29-30; App. E 20a). Sestito, a layman, said in his direct testimony that he thought he had "invested" his money and that he considered the $250.00 return on the $2,000 loaned to Shott to be "profit" (Tr. Trans. 21; App. E 15a). However, in the same breath, Sestito acknowledged that he had entered into a promissory transaction, that he had "received a note for the money," and that the return on the $2,000 was "for the money he had placed with [Shott]" (Tr. Trans. 21, 22; App. E 15a).

Sestito testified that he loaned Shott the money strictly on the basis of his long acquaintance, personal

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the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal.

SHOTT INVESTMENT CO.
By: Edgar I. Shott, Jr.

No. .....
Due November 29, 1960"

friendship and his trust that Shott would pay the money back (Tr. Trans. 29, 31; App. E 20a).[6] It is clear from the face of the note and the testimony that there was no security for the loan except Shott's own reputation. (Tr. Trans. 29, 31; App. E 20a). The agreement did not contemplate the subsequent delivery of any stock or other securities to Sestito; nor did Sestito thereby gain an ownership interest in any corporation or other enterprise. Sestito acknowledged that Shott "didn't sell [him] anything." (Tr. Trans. 30; App. E 20a). Further, the State, on direct examination, brought out the fact that this was the *only* loan transaction between Shott and Sestito; it was subsequently established that the note was repaid in full. (Tr. Trans. 32, 25; App. E 21a, 17a). Thus, the loan was merely a single, isolated transaction between these two old friends.

The single Sestito loan transaction constituted the entire case for the State. There was no evidence, nor was there an intimation, that Shott was dealing in

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[6] Although the note was formally signed by the "Shott Investment Company," Sestito paid no attention to the formal signature. (Tr. Trans. 31; App. E 21a). Appellant's counsel in his opening statement had described this Company:

> "Now, the evidence will show that the note was signed, 'Shott Investment, by Edgar I. Shott, Jr.' Now, the Shott Investment Company, as the evidence will indicate, was a partnership, consisting of Edgar I. Shott, Sr., the Defendant's father, and Edgar I. Shott, Jr., the Defendant, Edgar I. Shott, Jr., as Trustee for Patricia Shott, Edgar I. Shott, Jr., as Trustee for his five-year old son, Gregory. The evidence will show the Defendant established this partnership upon the advice of an attorney specializing in tax laws in order to place income in the hands of various relatives for whom he wished to provide, and for the legitimate purpose of reducing his own income tax payments. That is all the Shott Investment Company was, or was ever intended to be." (Tr. Trans. 9).

traditional "securities"—stocks and bonds; nor was there even a scintilla of evidence in the record of Appellant dealing with any other person or entering into more than one loan transaction with Sestito.

It appears from the opening statement of Appellant's counsel it was his original intention to put Appellant on the stand in his own defense.[7] (Tr. Trans. 8-9). However, when the State rested its case solely on the testimony of the single Sestito loan, Appellant's counsel, believing that no Blue Sky conviction was conceivable on such a record, did not put Appellant on the stand or introduce further evidence. Appellant moved for a directed verdict; the trial court overruled this motion without permitting counsel even to present his arguments. (Tr. Trans. 37).

3. Prosecutor's Closing Argument

To the complete surprise of Appellant, the prosecutor, in his closing argument, introduced "evidence" of an alleged series of transactions which purportedly made the single Sestito loan a part of a "public offering of securities":

> "[The prosecutor]: Do you think this is a single transaction? Do you think this is the only time this occurred; that this piece of paper, this security, was sold by Ed Shott? You have heard evidence of one—
>
> "Appellant's counsel: I will object to that, Your Honor.
>
> "The Court: Objection overruled." (Tr. 50).

* * *

[7] Counsel had indicated that Appellant was prepared to testify as to the purpose to which he applied the money borrowed from creditor Sestito. (Tr. Trans. 8-9).

"[The prosecutor]: And there [Appellant] sits. For just one reason, because he can't look you in the eye. He can't tell you that, because it isn't so, because there was more than one transaction, there was a multiplicity of transactions, and that is where the crime has been committed." (Tr. Trans. 75).

The prosecutor repeatedly stated that, contrary to the evidence, there was a series of transactions constituting a public offering of Appellant's promissory notes. (Tr. Trans. 50, 51, 52, 53, 74, 75).

Having "introduced" in closing argument "evidence" of an alleged series of transactions, the prosecution then berated the Appellant for not taking the stand in his defense. For example:

"How could you have proof, how could you learn whether or not there was more than one sale? You could learn it only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on that witness stand and look you in the eye and say, 'Ladies and gentlemen of the Jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito.' He could tell you that, and he's got the burden of proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify." (Tr. Trans. 74-75).

". . . [I]f he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you

today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him, . . ." (Tr. Trans. 49-50).

4. The Court's Instructions

The trial court's instructions, in effect, directed a verdict against Appellant. The court charged that the State, by introducing evidence of the single loan transaction, had sufficiently proved Shott's violation unless *Appellant* proved that the single Sestito transaction was *not* part of a public offering of securities. The court charged (i) that as a matter of law the Sestito promissory note was a "security" within the contemplation of the Ohio Blue Sky Law and that it was not registered as required by statute (Tr. Trans. 85, 88); (ii) that Shott was a "dealer" required to be licensed by the State (Tr. Trans. 85); (iii) that under the Ohio Blue Sky Law, Shott's making the note and handing it to Sestito constituted the "sale of a security" (Tr. Trans. 30-31, 86); (iv) that, in effect, the statute establishes a standard of strict liability requiring no common law *mens rea* (Tr. Trans. 86, 87), and (v) that whether Shott thought the promissory note was not a security was immaterial (Tr. Trans. 86).

The Court correctly explained that the substantive provisions of the statute did not reach single, isolated transactions (Tr. Trans. 89). However, the Court stated the burden of proving that the single promissory note was not part of a public offering was on Appellant (Tr. Trans. 90); and further, that evidence of a single transaction was, by statutory presumption, sufficient to establish defendant's guilt. (Tr. Trans. 90).

The Appellant challenged such instructions on the ground, *inter alia*, that they improperly placed the

burden of proof on defendant (Tr. Trans. 95). The Court overruled such objections, and on the tendered instruction, the jury could do nothing other than find Shott guilty. He was subsequently sentenced to serve one to five years in the penitentiary.

Before the trial court and on successive appeals to the Ohio Court of Appeals and the Ohio Supreme Court, the Appellant explicitly charged that the Ohio Blue Sky Law under which he was convicted was invalid on its face and as applied under the due process clause of the Fourteenth Amendment because it set no ascertainable standard of conduct, required no specific intent, and was so indefinite and vague as to be void.[8] Further, Appellant has specifically challenged the wrongful imposition of the burden of proof upon him, the unlawful presumption, and the misconduct of the prosecutor in closing argument.[9] Although neither Ohio appellate court wrote an opinion, by their *per curiam* affirmances both courts necessarily rejected such constitutional arguments.

THE QUESTIONS ARE SUBSTANTIAL

The core question presented to this Court is whether the State's conviction of Edgar Shott was obtained consistently with the due process clause of the Fourteenth Amendment. We submit that the record demonstrates that constitutional guarantees of due process and fundamentally fair procedure were denied to Appellant Shott in at least three major respects: (i) the

[8] Trial Court: Demurrer and Memorandum in Support, Tr. Trans. 2, Motion for New Trial. Court of Appeals: Shott Br. Ct. App. 5-31. Supreme Court: Shott Br. Sup. Ct. 8-22.

[9] Trial Court: Tr. Trans. 95, 50, Motion for New Trial. Court of Appeals: Shott Br. Ct. App. 32, 60, 67-73. Supreme Court: Shott Br. Sup. Ct., 37-38, 55-56, 62-67.

statute, as expansively interpreted by the trial court, became so broad and indefinite (and so different from the statute as written) that Appellant could not have been on notice of any criminal implications of his conduct; (ii) to extricate himself from these indefinite prohibitions, the statute required the Appellant, rather than the State, to shoulder the ultimate burden of proof, and it permitted a conviction to be based solely upon a statutory presumption which cannot be deemed reasonable upon the evidence which the State submitted. Moreover, (iii) the prosecutor's closing argument to the jury unlawfully transgressed even the most liberal bound of fairness, and compounded the problems of defense against the indefinite charges in question.

I. THE STATUTE, BY REASON OF ITS VAGUENESS AND INDEFINITENESS, AS APPLIED TO APPELLANT, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Statute Failed to Provide Appellant With Notice That His Conduct Fell Within Its Proscription.

1. It is Appellant's primary contention that the Ohio Blue Sky Law, as applied in this case, violated the "first essential" of due process of law—that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).[10] The essence of this fundamental safe-

[10] The predecessor Blue Sky Law, Ohio Gen. Code, § 6373-1 *et seq.*, repealed July 21, 1929, withstood a challenge in this Court in an appeal from a state civil proceeding. This Court held that the regulatory provisions of the law did not constitute a deprivation of property without due process, deny equal protection of the laws, or unlawfully burden interstate commerce. *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917). The issues raised in this appeal were not considered.

guard is that all persons are entitled to notice of the potential criminal conduct proscribed by the terms of a penal law. This Court recently restated this basic principle:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Corp.*, No. 18, October Term, 1962 (February 18, 1963) (slip opinion p. 4).

Cf., *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

Under this due process standard, a statute will not pass constitutional muster if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Connally* v. *General Construction Co., supra*, 269 U.S. at 391. This Court has consistently held invalid both state[11] and federal[12] statutes which failed to provide such notice.

2. An examination of the record here will demonstrate that the relevant provisions of the Blue Sky Law never "informed [Appellant Shott] as to what the State commands or forbids." *Lanzetta* v. *New Jersey, supra*, 306 U.S. at 453. Consistent with the recent admonition of this Court that cases such as this should not be evaluated "in the abstract," *United States* v. *National Dairy Corp., supra*, at 3, reference to the record and the evidence is essential. In "determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which a

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[11] *E.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

[12] *E.g.*, *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921).

defendant is charged." *Id.*, at 4. Here, we have a clear measure of the conduct which the trial court by its instructions and the appellate courts by their affirmances necessarily found sufficient to constitute a violation of the Blue Sky Law. When one compares Shott's conduct with the terms of the statute under which he was convicted, it is clear that "men of common intelligence" would never have foreseen that a single loan transaction with a friend could conceivably constitute evidence sufficient to support a criminal conviction for violating the Law.

First, Appellant was convicted on the initial count because he did "sell securities" without "being licensed by the division of securities." Ohio Rev. Code § 1707.44. It is indeed true under the Ohio Law a person "acting as broker for others in the purchase or sale of securities" must be "licensed as a dealer by the division of securities." Ohio Rev. Code § 1707.14. As explicitly defined in the Code, a "dealer" is

> "every person, other than a salesman who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, *in the business of the sale of securities.*" Ohio Rev. Code § 1707.01(E)(1) (Emphasis added.)

Measured against the due process standard of "common intelligence," the Ohio statute provides no warning whatsoever that every citizen of the State of Ohio who, like Appellant Shott, is a debtor in a single loan transaction thereby becomes a securities "broker" or "dealer" subject to the penal provisions of the Blue Sky Law. Indeed, the state courts of Ohio have heretofore recognized that a "dealer" is one who makes *successive sales* of securities as a business, and that the State has not stated a cause of action against an alleged

"dealer" based upon a single sale. *State* v. *Stockman*, 21 Ohio App. 475, 153 N.E. 250 (1926). Nevertheless, the strained statutory interpretation permitted in this case disregarded the plain meaning of the words of the statute and the interpretive case-law; and the trial court charged that Appellant was, as a matter of law, a "dealer" required to be licensed by the State (Tr. Trans. 85).

Further, on the second count, Appellant was convicted of "knowingly and intentionally sell[ing] . . . any [unregistered] security . . . [which] is not exempt," that is, for selling "commercial paper and promissory notes . . . offered directly or indirectly to the public." Ohio Rev. Code §§ 1707.44(C)(1) and 1707.02(G). As applied to the evidence of Appellant's "criminal" conduct in this case, it is clear that the statute inadequately defines the conduct subsequently held to be criminal.

Shott's commonly understood act of "making a promissory note" became "selling a security" only by an extraordinary feat of verbal legerdemain. In its charge, the trial court first ruled that the Sestito promissory note was a "security" (Tr. Trans. 85, 88). Making the note became a "sale" because the definition of sale included a "disposition" and disposition—though not defined—meant any "transfer" (Tr. Trans. 85-86). It followed that Shott's (the maker's) act of *handling the note to Sestito* constituted, in the trial court's eyes, a "sale of a security" (Tr. Trans. 30-31, 85, 88). It is obvious that such an attenuated chain of judicial reasoning violates the most fundamental principle of strict construction of a criminal statute, *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), and so expands the "common understanding" of a "sale" be-

yond any reasonable and intelligible bounds.[13] Certainly such a definition of "selling a security" was not the "accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . ." *United States* v. *National Dairy, supra* at 7.

3. Thus, the critical criminal provisions of this statute under which Appellant was convicted provided no indication whatsoever of their bounds and, as interpreted here, are so indefinite that they violate due process. Moreover, the statute, as interpreted, does not require a criminal intent, guilty knowledge or a traditional *mens rea* (Tr. Trans. 86-87). Proof of such an intent might have avoided the constitutional charge of vagueness, for, as Mr. Justice Douglas has stated, "the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion). *E.g., United States* v. *National Dairy Corp., supra* at 6-7; *Omcechevarria* v. *Idaho*, 246 U.S. 343, 348 (1918); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502 (1925); *cf., Smith* v. *California*, 361 U.S. 147 (1959). See, Packer, "Mens Rea and the Supreme Court," *The Supreme Court Review, 1962*, 122-27.

Nor is there anything inherent in this simple and innocent every-day act of making a promissory

[13] State courts have consistently held unlawful the application of vague and indefinite statutory proscriptions in criminal actions for violation of state securities acts. *State* v. *Skinner*, 20 Ala. App. 204, 101 So. 327 (1924); *Groskins* v. *State*, 32 Okla. Cr. 197, 4 P. 2d 117 (1931); *People* v. *Pace*, 73 Cal. App. 548, 238 P. 1089 (1925). *Cf. Kneeland* v. *Emerton*, 280 Mass. 371, 183 N.E. 155 (1932).

note which would "alert the doer to the consequences of his deed" and make apparent the duty to register, this single cognovit note with the Securities Division of the State of Ohio.[14] *Lambert* v. *California*, 355 U.S. 225, 228 (1957). Thus,

> "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.*, at 229-30.

4. It is significant that in no case in any jurisdiction has there ever been a Blue Sky conviction solely for making a single promissory note. In every reported case that we have found dealing with transactions in promissory notes, there was invariably some additional element—either proof of dealing in outstanding notes; of repeated issuances; of a pattern of transactions involving fraud; or of the promise of the future delivery

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[14] Similarly, there was nothing in the legislative history or the interpretative cases which would indicate that the criminal provisions were aimed at Appellant's conduct. *United States* v. *National Dairy Corp.*, *supra*, at 5-6. Indeed, the background and the context were just to the contrary; the State did not intend to regulate single, isolated loan transactions. See, Harper, *Protection of Investors Under the Ohio Securities Act*, 23 U.Cin.L. Rev. 418, 426, 429, 437 (1954); Boesel, *Analysis of the Ohio Securities Act*, 5 West.Res.L.Rev. 352, 360 (1954); Nida, *The Ohio Division of Securities and The Ohio Securities Act*, 13 OhioSt.L.J. 427, 429-30 (1952); *Need For A New Blue Sky Law*, Report of the Committee on Judicial Administration and Legal Reform, 1 Ohio Bar No. 42, pp. 5, 13, 15, 16 (1929).

of stock in a corporation or of an equity share of potential earnings combined with the note.[15] Such an element demonstrated that the purported promissory transactions were either a fraud, a disguise for an actual sale of stock or a mere incident to a public offering or to a security transfer. But here, there is not a single sentence in the record which indicates that this was anything other than a simple personal loan transaction.

As applied here, the Blue Sky statute fell far below the due process benchmark of certainty.[16] On this ground, the Court should note probable jurisdiction.

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[15] See, e.g., *State* v. *Weger*, 25 Ohio L. Abs. 49 (1937), *appeal dis'm.*, 133 Ohio 23, 10 N.E. 2d 634 (1937); *State* v. *Stockman*, 21 Ohio App. 475, 153 N.E. 250 (1926); *People* v. *Aresen*, 91 Cal. App. 2d 26; 204 P. 2d 389, 393 (1949); *People* v. *Sidwell*, 27 Cal. 2d 121, 162 P. 2d 913, 914 (1945); *Llanos* v. *United States*, 206 F. 2d 852 (9th Cir. 1953); *United States* v. *Monjar*, 147 F. 2d 916 (3d Cir. 1944); *cf.*, *S.E.C.* v. *Vanco, Inc.*, 166 F. Supp. 422 (D.C.N.J. 1958).

[16] This is *not* to say that the statute is necessarily vague for failure to provide notice no matter what conduct the State might prove in another case. It is only its application in these circumstances which we charge is unconstitutional. This Court has recognized that a statute might provide sufficient notice for core violations, while its application to "certain marginal offenses" might result in the conviction being reversed because the statute, as applied, failed to provide sufficient notice. *United States* v. *National Dairy Corp.*, *supra* at 4. *Cf.*, *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-32 (1951); *United States* v. *Petrillo*, 332 U.S. 1, 6-8 (1947); *Robinson* v. *United States*, 324 U.S. 282, 285-286 (1945).

B. The Only Extrication for the Appellant From the Vague Proscription of the Statute Was Through His Assuming the Burden of Proving His Innocence. The Application of This Burden Here Was in Violation of the Due Process Clause.

In order to extricate himself from the toils of this indefinite prohibition, Appellant was unconstitutionally required to assume the burden of proof and prove his innocence. In addition, the trial court held that the delivery of a single promissory note was, by the operation of a statutory presumption, sufficient evidence to prove a "public offering" of promissory notes. The statute so construed violates the due process clause.

It is clear that the Ohio Blue Sky statute in its substantive terms—as is true of blue sky laws generally—does not extend to a "single," "isolated," or "private" sale where there is no "public offering" of securities. See Loss, *Blue Sky Law* 369-74 (1958 ed.); *cf.*, 1 Loss, *Securities Regulation* 653-65 (1961 ed.). Under the Ohio Law "commercial paper or promissory notes" which are "not offered directly or indirectly for sale to the public" are not within the substantive sweep of the statute. Ohio Rev. Code § 1707.02(G). And, a sale is exempt if "it is not made in the course of repeated and successive transactions of a similar character." Ohio Rev. Code § 1707.03(B). Thus, proof of a single transaction does not, *per se*, fall within the substantive criminal provisions of the Ohio act. Nevertheless, Appellant's conviction became possible because the trial court held that under the provisions of the Blue Sky Law, proof of the single Sestito promissory note: (i) created an evidentiary presumption sufficient to support a conviction that there was a "public offering" of promissory notes, and (ii) shifted the burden of persuasion (not merely the burden of going forward

with the evidence) to the defendant to prove that the single note was *not* part of a public offering—in short, that it shifted to Appellant the need to prove his innocence. On both counts, under the settled decisions of this Court, the statute, so applied, deprived Appellant of due process of law.

1. The Unlawful Substantive Presumption

On the record in this case, the trial court instructed the jury that the Blue Sky Law "creates a presumption that an instrument which is a security is not exempt" (Tr. Trans. 90). Proof of the single Sestito note alone raised the evidentiary presumption, sufficient to support a conviction, that Appellant Shott was unlawfully engaged in making a "public offering" of his promissory notes and that the note in evidence was part of such "public offering." And, once evidence of a single transaction had been introduced, then "certificates" from the Division of Securities (Tr. Trans. 11-16; App. E 8a-11a) that the note is in fact not registered nor is the maker licensed constitute "sufficient proof" beyond a reasonable doubt that Appellant had *unlawfully* failed to register the note and that he was acting as an unlicensed dealer *in violation of law* (Tr. Trans. 85). See Sections 1707.30 and 1707.45. Thus, by means of the statutory presumption, proof of innocent conduct is escalated into proof of guilty conduct.

We submit that, inasmuch as there is no rational connection in this present record between the proof and the presumption, use of the statutory presumption here to support the conviction violates due process of law.

The states are not free to create evidentiary presumptions at will. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *Ameri-*

can Sugar Ref. Co., 241 U.S. 79, 96 (1916). To insure against the use of unfair and improper presumptions in state criminal trials, the due process clause of the Fourteenth Amendment "set[s] limits upon the power of . . . a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicted." *Tot* v. *United States*, 319 U.S. 463, 467 (1943). Constitutionally, a statutory presumption cannot be sustained if:

> "there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.*, at 467-68.

This Court has repeatedly declared invalid presumptions created by state and federal criminal statutes where there was no rational connection in common experience between the facts proved and the ultimate facts presumed. *Manly* v. *Georgia*, 279 U.S. 1, 5-7 (1929); *McFarland* v. *American Sugar Ref. Co.*, *supra*; *Bailey* v. *Alabama*, 219 U.S. 219 (1911); *Tot* v. *United States*, *supra*. Where this Court has sustained statutory presumptions in criminal cases, it has generally been on the ground that common experience teaches that the conduct proved is so extraordinary that it indicates on its face a sinister or unlawful plan of action. *Casey* v. *United States*, 276 U.S. 413, 418 (1928) (possession of morphine); *Yee Hem* v. *United States*, 268 U.S. 178, 184 (possession of smoking opium); *Hawes* v. *Georgia*, 258 U.S. 1, 4 (1922) (possession of unlicensed still); *Adams* v. *New York*, 192 U.S. 585, 599 (1904) (possession of policy slips). *Cf.*, *Tot* v. *United States*, *supra*, 319 U.S. at 470-72.

However, in the instant case, the single Sestito loan transaction is itself neither unusual nor sinister, nor

will it support the statutory presumption. Thousands of identical loan transactions are made very day in the State of Ohio in the normal, and perfectly legitimate, course of business. Evidence of a single loan transaction simply cannot raise the inference that the debtor had thereby entered into a public offering of his promissory notes. Such an inference is directly contrary to common experience. The drawing of it here compounded the indefiniteness of the statute by requiring the defendant to adduce further proof of the innocence of conduct innocent on its face.

Because this statutory presumption, as applied here, is unreasonable and completely "beyond the realm of common experience," it was unlawful under the Fourteenth Amendment. *Manley* v. *Georgia; McFarland* v. *American Sugar Ref. Co.; Bailey* v. *Alabama, supra; cf., Kennedy* v. *Mendoza-Martinez,* Nos. 2 & 3 October Term, 1962 (February 18, 1963) (dissenting opinion of Mr. Justice Stewart, slip opinion p. 17). And because the substantive evidentiary presumption is unlawful, the record is devoid of any evidence whatsoever to support the conviction for a public offering of promissory notes. This being the case, the conviction violates the standards of due process set down in *Thompson* v. *Louisville,* 362 U.S. 199 (1960), and *Garner* v. *Louisiana,* 368 U.S. 157 (1961), and must be reversed.

2. The Statute Unlawfully Placed the Burden of Proof Upon Appellant, Not the State

The Ohio Blue Sky Law, as applied here, unlawfully placed the burden of proof upon Appellant in square violation of the constitutional principles of *Morrison* v. *California,* 291 U.S. 82 (1934); *Tot* v. *United States, supra;* and *Speiser* v. *Randall,* 357 U.S. 513 (1958).

The trial court stated that the "statutory provision makes it the duty or the burden of the Defendant to prove by a preponderance of the evidence that the instrument is exempt; that is, that it was not offered directly or indirectly for sale to the public" (Tr. Trans. 90). Thus, it fell to Appellant to disprove the very conduct which constituted the core of the Blue Sky violation—a public offering of promissory notes.

Unlike a consideration of a case involving only civil sanctions, *S.E.C.* v. *Ralston Purina*, 346 U.S. 119, 126 (1953), any criminal conviction which is obtained by placing upon a defendant the burden of proving his innocence must be, under the teaching of this Court, carefully scrutinized. As Mr. Justice Frankfurter has explained:

> "Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of he boasts of a free society—is a requirement and a safeguard of due process of law in the historic procedural content of 'due process.'" *Leland* v. *Oregon*, 343 U.S. 790, 801-803 (1952) (dissenting opinion).

The due process clause limits the states in any attempt to place the burden of proof upon a defendant in a criminal trial. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt." *Speiser* v. *Ran-*

dall, supra, 357 U.S. at 526. To be sure, in certain extraordinary circumstances, the burden of going forward with the evidence or even the burden of ultimate persuasion as to certain matters may be lifted by statute from the state in a criminal prosecution and cast upon a defendant. *Morrison* v. *California,* 291 U.S. 82 (1934). *Cf., Coffin* v. *United States,* 156 U.S. 432 (1895). But *Morrison* v. *California* marks strict constitutional limitations upon such a shift of the burden of proof:

> "The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Morrison* v. *California, supra,* 291 U.S. at 88.

Holding in the *Morrison* case that the state had *not* "proved enough to make it just" to shift to the defendant the burden of proof as the state statute required, this Court noted that the state's evidence consisted solely of proof of possession of agricultural land, "an act that carries with it not even a hint of criminality." *Id.,* at 90. However, to justify the transfer the burden of proof to the defendant, "experience must teach that the evidence held to be inculpatory has at least a sinister significance" or at least involves "a manifest disparity in convenience of proof. . . ."[17] *Id.,* at 91. *Cf., Tot* v. *United States,* 319 U.S. at 469-70.

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[17] After this Court's decision in *Tot* v. *United States, supra,* the comparative convenience of producing evidence appears no longer a self-sufficient basis for shifting the burden of proof to the defendant. 319 U.S. at 469-70.

Similarly, the state cannot by means of a statutory "exemption" unfairly impose upon the defendant the burden of proving that he falls within such exemption, especially where the denial of such an exemption is akin to a penalty for a crime. *Speiser* v. *Randall*, *supra*, 357 U.S. at 525-26.

Tested by these standards, the statutory transfer of the burden of proof to Appellant in the instant case violated the due process clause.[18] Within the terms of *Morrison*, the State has not "proved enough" of the Blue Sky violation to shift the burden of persuasion when it introduces nothing more than evidence of a single promissory transaction, especially where such a transaction on its face "carries with it not even a hint of criminality."[19] Here as in *Morrison*, the conduct which the State proved indicates "no such probability of wrong doing . . . [so] as to awaken a belief that [Appellant] is guilty if he fails to come forward with an explanation." 291 U.S. at 90. It is probable that the head of every family in Ohio has entered into numerous promissory transactions which under the interpretation of the trial court constitute "sales of securities." Clearly there is nothing "inculpatory" or "sinister" about such acts. Nevertheless, evidence of

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[18] This is *not* a case where the state was required to prove all the elements of a criminal violation and placed upon defendant merely the burden of proving a special defense, raised by separate pleadings and considered separately by the jury. *Leland* v. *Oregon*, 343 U.S. 790, 795-96, 799 (1952). Here, under the trial court's instructions, the Appellant had the burden of proof on the central issue of the substantive violation—whether the Sestito note was "offered to the public."

[19] *Cf.*, the facts of record in *Catterlin* v. *State*, 16 Ohio L. Abs. 410 (1934), *appeal dis'm.*, 128 Ohio 110, 190 N.E. 578 (1934), *appeal dis'm.*, 292 U.S. 614 (1934).

an everyday transaction, made innocently and in good faith, resulted in the burden of persuasion resting not upon the state to prove guilt, but upon the individual to prove innocence. This cannot comport with the standards of procedural due process set forth in *Morrison* v. *California* and *Speiser* v. *Randall*.

Accordingly, the indefiniteness of the statute as applied here not only violated due process in that it failed to give the Appellant notice of the forbidden conduct; it required him, once proof of the happening of an everyday transaction had been introduced, to exculpate himself from a charge which the facts submitted by the prosecution, under the vague contours of the statute, did not tend even to prove. This, too, was a violation of the due process clause.

II. THE PROSECUTOR'S CLOSING ARGUMENT DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

This Court has held that the state's failure to afford a defendant a fair hearing "violates even the minimal standards of due process." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The prosecutor, as the representative of a sovereign whose obligation is to govern impartially, has a duty to insure that a fair hearing is actually provided. *Berger* v. *United States*, 295 U.S. 78 (1935). When state prosecutors have been guilty of gross misconduct in trying a criminal defendant, this Court has not hesitated to grant relief. See *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948); *Mooney* v. *Holohan*, 294 U.S. 103, 112-13 (1935). *Cf., Adamson* v. *California*, 332 U.S. 46, 58 (1947); *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *Lisbena* v. *California*, 314 U.S. 219, 237 (1941).

The record demonstrates the unusual situation where the prosecutor, in his closing argument, has stepped beyond the basic standards of fair procedure and necessarily precluded a fair and reasoned consideration of the evidence by the jury. For this reason, the conviction should be reversed. First, in his closing statement, the prosecutor repeatedly attempted to introduce evidence of an extended series of similar loan transactions. See pp. 8-10, *supra*. This was clearly improper because the evidence in this record is limited to a single private loan transaction which the creditor-witness himself stated was the only loan transaction in which he and the Appellant were involved. Clearly, due process demands that an accused be convicted only by evidence in the record, *Thompson* v. *Louisville*, *supra*, and not by the prosecutor's constant charge that Appellant had entered into a series of promissory transactions.

Further, the prosecutor's repeated, startling attacks against Appellant for not taking the stand is a deprivation of due process in these circumstances where the State had proved nothing but innocent conduct and where a finding of guilt could be supported only by a technical statutory presumption and by the transfer of the burden of proof to the defendant. In such circumstances, the prosecutor's statements were clearly unfair. Here, the prosecutor demanded a conviction based not upon evidence in the record, but solely upon an inference of guilt because Appellant had refused to take the stand in his defense. *Cf. Adamson* v. *California*, 332 U.S. 46, 58 (1947). Thus, the prosecutor's conduct fell below the standards of due process. As this Court said in *Viereck* v. *United States*, 318 U.S. 236, 248 (1943):

> "He [the Prosecutor] may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Moreover, this conduct of the prosecutor underscored, and imposed more onerously upon Appellant, the constitutional faults of the statute, as applied here, that we have discussed under Point I. The prosecutor's remarks completed the snare in which the Appellant was caught by the indefiniteness of the statute and the imposition of the burden on the defendant to extricate himself from its toils.

CONCLUSION

In non-technical terms, the essential question in this case is whether a State can put a man in jail for uttering a single promissory note. We submit that it cannot where the terms of the penal statute are vague and indefinite, where the statute creates an unreasonable presumption of guilt, where the defendant must prove his innocence, and where he must bear the brunt of the prosecutor's improper and unfair closing argument. For these reasons, Appellant's conviction violated the due process clause of the Fourteenth

Amendment and probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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Appendix A—Judgment of Affirmance and Opinion of Ohio Court of Appeals

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. 9019.

STATE OF OHIO, *Plaintiff-Appellee*

v.

EDGAR I. SHOTT, *Defendant-Appellant*

JUDGMENT OF AFFIRMANCE

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration where of the Court find there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the appellee recover from the appellant, his costs herein expended taxed at $.....

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment. To all of which appellant, by his counsel, excepts.

[caption omitted]

OPINION—DEC. 11, 1961

APPEAL ON QUESTIONS OF LAW,
FROM COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO.

Messrs. C. Watson Hover, Hamilton County Prosecutor; Harry C. Schoettmer and Calvin W. Prem, for Plaintiff-Appellee,

Messrs. James G. Andrews, Jr., and John A. Lloyd, Jr., for Defendant-Appellant.

PER CURIAM.

An examination of the record discloses no error, prejudicial to the rights of Appellant. The judgment of the Court of Common Pleas, Hamilton County, Ohio is, therefore, affirmed.

LONG, P. J., and HILDEBRANT, J., Concur.

Appendix B—Judgment of Ohio Supreme Court

IN THE SUPREME COURT OF THE STATE OF OHIO

1962 Term To wit: Wednesday, June 27, 1962

THE STATE OF OHIO, }
CITY OF COLUMBUS. }

No. 37456

STATE OF OHIO, *Plaintiff-Appellee,*

v.

EDGAR I. SHOTT, JR., *Defendant-Appellant.*

Appeal from the Court of Appeals
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner

prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff appellee recover from the defendant appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

* * * * * * * * * * *

THE SUPREME COURT OF THE STATE OF OHIO

No. 37456

[caption omitted]

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by .....

.....

Appendix C—The Statute Involved

Ohio Securities Act, Ohio Rev. Code, §§ 1707.01-1707.45:

"§ 1707.01 *Definitions.* (GC § 8624-2)

As used in sections 1707.01 to 1707.45, inclusive, of the Revised Code:

* * *

(B) 'Security' means any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or

credit of any person or of any public or governmental body, subdivision, or agency. It includes shares of stock, certificates for shares of stock, voting-trust certificates, warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidences of indebtedness, bonds, debentures, land-trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, certificates or written instruments in or under profit-sharing or participation agreements or in or under oil, gas, or mining leases, or certificates or written instruments of any interest in or under the same, receipts evidencing preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, certificates evidencing an interest in any trust or pretended trust, any investment contract, any instrument evidencing a promise or an agreement to pay money, warehouse receipts for intoxicating liquor and the currency of any government other than those of the United States and the Dominion of Canada but such sections shall not apply to bond investment companies or to the sale of real estate. 'Security' shall, for the purposes of such sections, be deemed to include real estate not situated in this state and any interest in real estate not situated in this state.

(C)(1) 'Sale' has the full meaning of 'sale' as applied by or accepted in courts of law or equity, and includes every disposition, or attempt to dispose, of a security or of an interest in a security. 'Sale' also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

(2) 'Sell' means any act by which a sale is made.

* * *

(E)(1) 'Dealer,' except as otherwise provided in sections 1707.01 to 1707.45, inclusive, of the Revised Code, means

every person, other than a salesman who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, in the business of the sale of securities.

(2) 'Licensed dealer' means a dealer licensed under such sections. * * *

§ 1707.02 *Exempt securities.* (GC § 8624-3)

* * *

(G) Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public. * * *

§ 1707.14 *Dealer's license required; exceptions.*

(A) No person shall engage in this state in the business of acting as broker for others in the purchase or sale of securities unless such person is licensed as a dealer by the division of securities.

(B) No person shall sell securities within the state or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless such person is licensed as a dealer by the division, except in the following cases:

* * *

(2) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under division (G) or (I) of section 1707.02, or under section 1707.04, of the Revised Code, or if such issuer is not a dealer under section 1707.06 of the Revised Code; * * *

§ 1707.30 *Certificate of division as evidence.* (GC 8624-33)

In any prosecution, action, or proceeding based upon sections 1707.01 to 1707.45, inclusive, of the Revised Code, a certificate signed by the division of securities, showing the filing of or the failure to file any statement, description, or application required by such sections, shall constitute

prima-facie evidence of such filing or of such failure to file, and shall be admissible in evidence in any action at law or in equity to enforce sections 1707.01 to 1707.45, inclusive, of the Revised Code, or to prosecute violations of such sections.

§ 1707.44 *Violations.* (GC § 8624-25)

(A) No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L), inclusive, and (P) to (R), inclusive, of section 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code, or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities.

• • •

(C) No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description or qualified, and is not the subject matter of a transaction that has been registered by description; • • •

§ 1707.45 *Burden of proof.* (GC § 8624-25)

In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary

to negative the existence of facts which would bring a security within section 1707.02 or 1707.05 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04, or 1707.06 of the Revised Code or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. The burden of proof shall be upon the party claiming the benefits of any of such sections."

Appendix D—Indictment

THE STATE OF OHIO, HAMILTON COUNTY

THE COURT OF COMMON PLEAS OF HAMILTON COUNTY: Term of April in the year nineteen hundred and SIXTY ONE HAMILTON COUNTY, ss

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that

EDGAR I. SHOTT, JR.

on or about the TWENTY EIGHTH day of SEPTEMBER in the year nineteen hundred and SIXTY at the County of Hamilton and State of Ohio, aforesaid, did unlawfully sell, cause to be sold, offer for sale, or cause to be offered for sale, to PATRICK SESTITO, a security, to-wit, a written instrument evidencing a promise to pay money, which the said EDGAR I. SHOTT, JR., hereinbefore mentioned was not then and there licensed to sell securities in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45 inclusive, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that

on or about the TWENTY EIGHTH day of SEPTEMBER, in the year nineteen hundred and SIXTY, at the County of Hamilton and State of Ohio aforesaid, did knowingly, unlawfully and intentionally sell, cause to be sold, offer for sale or cause to be offered for sale to PATRICK SESTITO, a security, to-wit: A written instrument evidencing a promise to pay money, which security was not then and there registered by description nor then and there registered by qualification in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45, inclusive, and which security and transaction was not then and there registered or exempted by Ohio law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ C. WATSON HOVER
Prosecuting Attorney
Hamilton County, Ohio

Appendix E—Transcript of Evidence

William J. Reidenbach,

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prem [The prosecutor]:

Q. Will you state your name and address to this jury, please? A. William J. Reidenbach, 876 Poling Drive, Columbus, Ohio.

Q. And for the purpose of the record, will you spell your last name? A. (Spelling) R-E-I-D-E-N-B-A-C-H.

Q. Now, Mr. Reidenbach, you are an attorney-at-law? A. I am.

Q. And by whom are you employed? A. The State of Ohio, Department of Commerce, Division of Securities.

Q. In what capacity do you work for the Division of Securities? A. Attorney Examiner.

Q. And in connection with your duties, Mr. Reidenbach, let me ask you if you had an occasion to examine the records of the Division of Securities to ascertain whether Edgar I. Shott, Jr., the Defendant in this case, was licensed by the Division of Securities of this state as a broker on or about the 28th day of September, 1960? A. Yes, I did make such an examination.

Q. Was he licensed on that date? A. No.

Q. Has he ever been licensed by the Division of Securities of this state? A. No.

Mr. Prem: May I have these marked for identification.

(Thereupon the documents above referred to were marked for identification State's Exhibits Nos. 1, 2 and 3, respectively.)

Q. Now, Mr. Reidenbach, I would like to show you a paper we have marked for identification as Exhibit No. 1. Let me ask you if you had an occasion to examine the records of the Division of Securities of this state with reference to that piece of paper to ascertain whether that piece of paper, that instrument had ever been registered with your department? A. Yes, I have made such an examination.

Q. And has that instrument been registered with your department? A. No, it has not.

Q. Or I should say, was it so registered on the 28th day of September, 1960? A. No.

Q. Does your department have any record of any instrument issued by the Defendant, Edgar I. Shott, ever having been registered with your department? A. No.

Q. Mr. Reidenbach, in connection with your duties as an Attorney Examiner, I would like to now ask if, in compliance with Section 1707.30 of the Revised Code, your department prepared a certificate stating that Edgar I. Shott has not been licensed by the State of Ohio? A. Yes.

Q. And did you also have prepared or bring with you a certificate showing that the instrument I just showed you was not registered? A. Yes.

Mr. Lloyd: If your Honor, please, for the purpose of saving time, we will agree to stipulate all of this.

Mr. Prem: I am through it now, Judge.

Q. I would like to show you State's Exhibit Nos. 2 and 3 marked for identification, and with reference to No. 2, first, will you tell the jury what that is? A. Exhibit 2 is a certificate of the Division of Securities, which certifies that the records of the Division disclose that Edgar I. Shott, Jr., has, at no time, been issued a Security Dealer's or Security Salesman's license.

Q. And by whom is that certificate signed? A. By the Chief of the Division.

Q. What is his name? A. W. Patrick Green.

Q. Now, I would like to have you look at No. 3 for identification. Tell the jury what that is. A. Exhibit 3 is a certificate of the Division, which certifies that the records of the Division show that none of the instruments issued by Edgar I. Shott, Jr. have been registered with the Division of Securities.

Mr. Prem: Your Honor, at this time the State would like to offer into evidence as exhibits, those that have been marked Nos. 2 and 3 for identification.

Mr. Lloyd: Now, I am going to object to that, your Honor. I am going to tell you why. I would like to be heard.

The Court: Objection overruled. I think I know why. Nos. 2 and 3 will be admitted.

(The documents heretofore marked for identification State's Exhibit Nos. 2 and 3, were received in evidence.)

Mr. Prem: You may cross examine.

Cross Examination

By Mr. Lloyd [defense counsel]:

Mr. Lloyd: Will you please mark these for identification.

(Thereupon the documents above referred to were marked for identification Defendant's Exhibit Nos. 4 and 5, respectively.)

Q. (By Mr. Lloyd) Now, Mr. Reidenbach, I hand you a writing marked as the Defendant's Exhibit 4. Will you identify that for me, please, if you can? A. Exhibit 4 is a form used by the Division of Securities.

Q. Now, sir, I hand you a document denominated Defendant's Exhibit 5. Will you identify that for me, if you can? A. Exhibit 5 is also a form used by the Division of Securities.

Q. Can you tell us, Mr. Reidenbach, for which purpose this document known as Defendant's Exhibit 5 is used? A. Exhibit 5 is a form called Form 6—

Q. Excuse me, sir, that is wrong. I did not intend to hand you that. It is my mistake. I intended to hand you this other Exhibit 4. A. Exhibit 4 is a form called Form 9, which is used by persons making an application to the Division to register certain securities.

Mr. Lloyd: Your Honor, we have no further cross examination of this witness.

Mr. Prem: We have no further questions.

(Witness excused.)

The Court: Are you finished? There will be no further examination of Mr. Reidenbach?

Mr. Prem: That is just what we were talking about, Judge. At this time we can't state whether we will need that witness again.

The Court: All right, then he had better leave the Court Room.

Mr. Prem: Patrick Sestito.

Patrick Sestito.

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prem:

Q. Mr. Sestito, will you state your full name to this Court and jury? A. Patrick Sestito.

Q. And how do you spell your last name? A. (Spelling) S-E-S-T-I-T-O.

Q. Where do you live? A. 5605 Abbottsford.

Q. Is that here in Cincinnati, Ohio? A. Yes, sir.

Q. Cincinnati 13, I believe? A. Yes, sir.

Q. What is your business or your occupation, Mr. Sestito? A. Salesman, furniture.

Q. And where do you work? A. Fox Furniture Company.

Q. How long have you been employed as a salesman, furniture salesman? A. For which outfit, sir?

Q. How long have you been engaged in that business? A. Oh, about six years.

Q. I would like to ask you if you are acquainted with the Defendant in this case, Edgar I. Shott, Jr.? A. Yes, sir.

Q. Let me ask you if you had an occasion to see Mr. Shott on or about the 28th day of September, 1960? A. Yes, sir, I did.

Q. What was the occasion for your seeing him on that day? A. Well, I went there just to make a regular visit, and of course, naturally he approached me on this, you know, lending money, and of course, naturally I loaned him some money.

Q. Well, now he was—where was it you saw him on that day? A. At his office.

Q. Where is his office located? A. Atlas Bank Building, second floor.

Q. That is here in Cincinnati, Hamilton County, Ohio? A. Yes, sir.

Q. And what time of the day was it that you went there, if you recall? A. Well, I would say it was about 1:30, somewhere in the afternoon.

Q. In the afternoon? A. Yes, sir.

Q. When had you been there prior to that date? A. Well, I mean—well, I know Mr. Shott. I stopped in several times. I mean I just couldn't say.

Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960? A. No, sir, not that I can remember.

Q. Had you telephoned to Ed? A. No, sir.

Q. Or made any contact with him? A. No, sir, I just dropped in.

Q. When you dropped in, was there any purpose for your dropping in on that date? A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him.

Q. Did you have any money with you? A. Yes, sir, I had about—little over $2,000.00 with me.

Q. Now, let me ask you, Mr. Sestito, if on that date you had any conversation with Mr. Shott about the Shott Investment Company? A. Yes, sir, we did.

Q. And what was the conversation you had? A. Well, I mean of course, he approached me on this investment, and he told me—he asked me if I wanted to make some money. Of course, naturally everybody wants to make money. And so I asked him a few questions about it and, of course, he told me that this money was being invested on financing buildings, and so forth.

Q. Well, had you heard or did you have any knowledge about this Shott Investment Company before you went there on that day? A. Well, sir, I mean I have heard around. I mean, you know, there was such an investment going around.

Q. And what was it that Mr. Shott told you about the company and the investments that were being made? A. Well, I mean, of course, naturally, I asked him if I could

check it out and, of course, knowing Mr. Shott I figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing it in buildings and financing. I know finance companies make a lot of money. I do know that.

Q. Did he say who was investing it in buildings and financing and making a lot of money? A. No, sir, he didn't state that.

Q. Was there any conversation had with you at that time about your participating in those investments? A. Sir, I didn't understand that.

Q. Did he ask you for any money? A. Yes, he did.

Q. Did he ask you for any particular amount? A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good? A. Well, the percentage, twelve and a half per cent.

Q. What were the arrangements that were to be made? A. Twelve and a half percent for 60 days.

Q. Let me ask you if, in the course of your conversations about the Shott Investment Company, that you had with Mr. Shott on that day in his office, he showed you anything about the company? A. Well, yes, he showed me, oh, I don't know what you would call it. An eight and a half by eleven stationery, plaque more or less, showing about these Shott investments.

Q. What do you mean showing about the Shott investments? A. Of course, I couldn't read it. I couldn't remember it. It told about the company, Shott's investments.

Q. Did it have writing or figures or what did it contain? A. Well, it just stated, you know, like—told about the company, like it's been in effect since—of course, I couldn't remember the date. I think it said something like 1955.

Q. Did it say anything about the investments that were being made? A. Well, sir, I can't remember that. I just glanced at it and didn't study it too much.

Q. After you read that, did Mr. Shott make any other explanations to you about how the company operated or what was happening to the money? A. No. Of course, he specified to report it to the—of course, I asked him—of course, I figured it was legitimate because I mean he being a lawyer, it was straight up and down. And he says report it to the income tax. And, of course, naturally when he said that I figured it was all right.

Q. Report what to the income tax? A. The profit.

Q. Did you invest any money on that day? A. Yes, sir, $2,000.00.

Q. And how did that transaction take place? A. Well, I received a note for the money. I believe it is right here.

Q. I mean did you give him that money at that time? A. Yes, sir, I did.

Q. Was that part of the money you had in your pocket? A. Yes, sir.

Q. Was that the reason you went to that office? A. Well, I mean not necessarily. It was just more or less, you know, just a social call, just to stop in and say hello.

Q. And you had that money in your pocket at the time? A. Yes, sir, I did.

Q. Now, how did you pay him the $2,000.00? A. Well, I had a check from Irvin's Furniture, which was a large, I would say about $1,200.00, and the rest was in cash.

Q. You gave him $2,000.00, including that $1,200.00 check? A. No, sir, the $1,200.00 check and the balance of $800.00, which made a total of $2,000.00.

Q. And the piece of paper that you received back from Mr. Shott, what amount was stated, if any, on it? A. If I remember correctly, it was $2,250.00.

Q. Now, the $250.00 above the $2,000.00 stated on that piece of paper, what did that represent? A. Twelve and a half per cent profit.

Q. For the money that you had placed with him? A. Yes, sir.

Q. I would like to show you a piece of paper we have marked with the No. 1 for identification, Mr. Sestito. You

examine that. Have you ever seen it before? A. Yes, sir; that's the note that he gave me.

Q. And was that the note that he gave you on September the 28th, 1960, at his office in the Atlas Bank Building of this county? A. Yes, sir.

Q. Was that the piece of paper that you received after you paid him $2,000.00? A. Yes, sir, it is.

Q. Did you see Mr. Shott or come into contact with Mr. Shott again after that date? A. Well, I mean I was over in Covington about two months ago. I was just cruising by. I signaled at him but nothing else.

Q. Let me withdraw that question and restate it. I perhaps asked you in a clumsy fashion. When was the $2,250.00 to be paid to you as you understood the transaction? A. Well, 62 days later.

Q. Well, what date? A. Well, to be truthful with you, I couldn't remember the date. I think it was the last of November, though, somewhere in there.

Q. The last of November. And this piece of paper that was given to you that we have referred to as Exhibit No. 1 for identification, who was that signed by, or how was that signed? A. Well, to tell you the truth, I don't know. I believe it is Mr. Shott's writing.

Q. Well, I mean was it given to you by Mr. Shott? A. Yes, it was.

Q. And what did it say on there? A. Shott Investment Company and his name below it.

Q. And did it indicate a date that it was due? A. Yes, due November the 29th, 1960.

Q. Now, between September the 28th, 1960 and November the 29th, 1960, did you come into contact with Mr. Shott? A. Yes. When it was due, I mean his secretary called me and asked me if I wanted to parlay it or—

Q. Wanted to what? A. Wanted to, you know, to parlay it.

Q. What do you mean parlay it? A. Well, to let it ride, or, you know, or draw the profit out. Of course, I told her I wanted to, you know, draw it out.

Q. She asked you if you wanted to let it ride? A. Yes, sir.

Q. What did you understand that to mean? A. Well, I mean to invest it all over again.

Q. Reinvest it? A. Yes, sir.

Q. Did you reinvest it? A. No, I didn't.

Q. What did you do? A. I withdrew my money.

Q. Well, did you go there to the office? A. Yes, sir, I went there to the office and I received a check.

Q. How many checks did you received? A. One check for the full amount.

Q. $2,250.00? A. Yes, sir.

Mr. Prem: Your Honor, at this time I would like to offer into evidence Exhibit No. 1.

Mr. Lloyd: No objection.

(The document heretofore marked for identification State's Exhibit No. 1, was received in evidence.)

Mr. Prem: You may cross examine.

Cross Examination

By Mr. Andrews:

Q. Let me ask you, you used some colorful language on the stand here. Now, you testified you are a furniture salesman, right? A. Right.

Q. And you normally refer to that as hustling sticks, don't you? A. Well, yes, that's right.

Q. And I want you to be a little bit more careful now on, if you will, Pat, and use the language —

The Court: Objection sustained.

Mr. Schoettmer: I don't think we need this kind of comment.

The Court: No, you don't have to instruct the witness.

Q. Pat, how long have you known Ed Shott? A. Well, I would say since about 1953, I would say.

Q. And in the ensuing years he has represented you a couple of times, one time when you got sick after eating something, and he represented you on that. Later on you

had one of your employers go bankrupt and he handled that for your employer; is that right? A. Yes, he did.

Q. And periodically you stopped in the office and talked to Ed, and if Ed was not there, you would talk to me, right? A. Yes.

Q. This has gone on over a long period of years, right? A. Right.

Q. Now, going back to September of 1960, when this transaction took place in the office, your testified on direct that you had heard about investment opportunities or something of that nature; is that right? A. Yes, I did.

Q. Involving Leslie Stickler? A. Well, no. I mean I didn't know about that at that time. I didn't know about that.

Q. Where did you hear it and who did you hear it from? A. Well, I heard it, well car dealers. A couple of places mentioned, you know, about this.

Q. Where? A. Reading Road in particular. I believe this State Motors, somebody at State Motors. But, of course, he may not have known what he was talking about, but I did hear it.

Q. You knew Ed over this long period of time and you talked to Ed quite a few times during the period of a month or a period of six months, right? A. Oh, yes.

Q. And isn't it a fact that Ed was the one who told you that he was loaning money to Les Stickler? A. No, he didn't say who he was loaning it to. No, I don't remember that.

Q. How did you find out he was loaning it to Les Stickler then? A. Well, I read that in the newspapers. I mean I really don't know.

Q. You found out from the newspapers? A. Yes. I mean when it was all—when the whole thing was up.

Q. Are you telling, do you want this jury to believe the first time you knew Ed Shott was loaning money to Stickler was when you read it in the newspapers? A. That's right.

Q. How did you happen to loan money directly to Stickler? A. A fellow by the name—

Mr. Schoettmer: Objection. We are not concerned with that here.

Mr. Andrews: This goes to his credibility.

Mr. Schoettmer: I will withdraw it.

A. Well, a fellow that worked up there at the furniture company, I don't know how he knew him, but he did know about it. His name was Eddie Mitchell, and of course, he mentioned the fact that Stickler investment was giving, you know, a much higher rate. So that is how come I went there.

Q. But, let me ask you something. Fifteen or 20 minutes ago, when we were out in the hall, didn't you tell me that you had nothing against Ed Shott, except it was through him you heard about Stickler, and through him you loaned to Stickler, and when you loaned to Stickler, you lost your money?

Mr. Schoettmer: I object.

The Court: Objection sustained. You can't impeach your own witness.

Mr. Andrews: He is not my own witness, if the Court please. I am impeaching him.

Mr. Schoettmer: We are not concerned about his personal feelings about Ed Shott, your Honor, regardless of what he told the counsel. We are after the truth what happened in this transaction.

The Court: That is all we want to know.

Q. Didn't you tell me that out in the hall about 20 minutes ago, Pat? A. Well, actually—

Q. Just yes or no; did you tell me or didn't you? A. Yes.

Q. Actually, when you went into Mr. Shott's office on the 28th of September, Mr. Shott told you that he would like to borrow some money from you, didn't he? A. That's right.

Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time? A. That's right.

Q. And you trusted Ed Shott? A. That's right.

Q. You trusted his ability to pay it back to you? A. Yes, sir, I did.

Q. And between the two of you, you agreed to lump the principal and this twelve and a half per cent interest and show it on the face of the note as a loan of $2,250.00? A. Right.

Q. And it was not your intention to charge, you didn't expect to receive any interest in addition to the $250.00 which was included in the principal amount in the face amount of the note, did you? A. No, I didn't.

Q. And it was after that agreement was made between you and Ed that the loan agreement was then reduced to writing in the form of this note that is in evidence; is that right? A. Right.

Q. He called out to his secretary and said, "Mr. Sestito and I"—"I am borrowing so much money, so make up a note for Mr. Sestito," right? A. Right.

Q. He didn't sell you anything, did he? A. Well, no.

Mr. Schoettmer: Counsel hasn't been sworn, has he, your Honor? He has been doing the testifying. I object to all this.

Mr. Andrews: I am leading the witness, your Honor.

The Court: As to the last part, whether he sold him anything. You did deliver—he did deliver this instrument to you, didn't he?

The Witness: Well, I got the note, yes.

The Court: He delivered that to you, didn't he?

The Witness: I got it there that date.

Q. Who gave it to you, Ed or his secretary. A. Well, to be truthful, I don't remember. I believe, I will swear I don't know. There was a lot of people up there and there was a lot of confusion. I believe that he signed it. I believe he did.

Q. You aren't sure whether he signed it? A. Really, I am not.

Q. As a matter of fact, Pat, you knew Ed all these years and you knew if you loaned him money he would pay it back to you, isn't that right? A. Yes, I trusted him.

Q. You didn't pay any attention to how it was signed or anything else? A. That's right.

Q. And when it was due, what happened, you got it back? A. That's right.

Q. With interest? A. Right.

Q. The paper that you saw, you testified to on direct examination, you said you thought that indicated Shott Investment, this partnership had been in existence since 1955; as a matter of fact, that didn't come into existence until January, 1960, isn't that correct?

Mr. Schoettmer: He doesn't know. Counsel is testifying again.

The Court: Objection sustained. When there is an objection, wait until the Court rules.

Q. Do you know the Shott Investment, this partnership, when it was created? A. No, I really don't. That was more or less a guess.

Mr. Lloyd: Your Honor, this involves a point. We would like to have a second to confer.

Mr. Andrews: If the Court please, we will not ask this witness any more questions on cross examination at this time, with the understanding we would like to have permission to recall him on cross examination at some later time.

Mr. Schoettmer: There is no objection.

The Court: All right.

Mr. Prem: I would like to ask one or two additional questions on redirect examination.

Redirect Examination

By Mr. Prem:

Q. Mr. Sestito, had you made any similar, any loan transactions with Mr. Shott like the one you just described to the jury prior to that date? A. No, sir.

Q. Or since that date? A. No, sir.

Q. And the $2,000.00, or little more, that you had with you the day you went down to Mr. Shott's office, where

did you get that money? A. Well, part of it was commission from Irvin's Furniture and the other, you know, I accumulated. I mean I carry that much money in my pocket.

Q. Did you get it from any loan company? A. No, not at that time. But later on, when I invested with Stickler, I did. No loan company.

Mr. Prem: That is all. We have no additional questions.

The Court: All right.

(Witness excused.)

The Court: You say you may want to recall this witness?

Mr. Andrews: We may want to recall him later on, Judge. That is by agreement with the State.

The Court: I don't want to keep the witness sitting around longer than necessary.

Mr. Andrews: Not today. We will take care of notifying him to come back.

The Court: All right.

Mr. Schoettmer: The State rests.

The Court: The State rests.

. . . . . .